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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-11

LEWIS GENE FREEMAN,
Petitioner,
v.
UNITED STATES OF AMERICA AND THE SECRETARY OF THE TREASURY OF THE UNITED STATES,
Respondents.

Brief of the Citizens Committee for the Right to Keep and Bear Arms as Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS AS AMICUS CURIAE

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BRIEF OF THE CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS AS AMICUS CURIAE

INTEREST OF THE AMICUS

The Citizens Committee for the right to keep and bear arms was incorporated in January 1974 as the successor of an unincorporated committee formed in 1971. The committee was originally formed and currently exists for the purpose of preserving the effectiveness of the Second Amendment to the United States Constitution and providing aid and information to people throughout the United States who share in that goal. The committee has a broad base of support with 41,000 members residing in

virtually every state of the union. The Honorary National Chairman is Mr. Arthur Godfrey and its National Advisory Council consists of numerous distinguished people including members of Congress, university professors, and citizens from many other walks of life.

The instant case raises an important, if not crucial, issue going ultimately to whether an act of Congress may, under any circumstances, be held invalid under the Second Amendment to the United States Constitution. Dismissal of the case at its outset can be sustained only if the Second Amendment grants no private rights and has, in fact, become an anachronistic embellishment of our Bill of Rights.

The Citizens Committee for the right to keep and bear arms asserts that the rights guaranteed by the Second Amendment to the United States Constitution are basic and fundamental rights possessed by the citizens of the United States. The Committee fully adopts the position of the Bar Association of Michigan:

> . . . the right to bear arms is a basic right. We believe that the right granted under the second amendment is one granted to the individual and not to the militia as an organization.

Resolution passed by the Michigan Bar Association, quoted in Feller and Getting, "The Second Amendment: A Second Look," 61 Nw. U. L. Rev. 46, at fn. 3 (1966).

The Committee engages in public discussion and debate concerning the extent and nature of the right to keep and bear arms, monitors and advises its members of legislative developments in the national and state legislatures, represents its members in presenting views to Congress on proposed legislation relating to the keeping and bearing of arms, and generally, serves as a major spokesman for the point

of view that the Second Amendment remains a vital part of the Bill of Rights. Therefore, the interest of Amicus Curiae herein is to oppose the lower court's misinterpretation of the Second Amendment of the Constitution which would, in effect, deny protection to individual rights arising under the Amendment. As a major organization active in this specialized area, Amicus believes it can contribute significantly to the court's understanding of these important issues.

The filing of this brief as Amicus Curiae has received the consent of both parties to the action.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Indiana and the opinion of the Court of Appeals for the Seventh Circuit, contained in its "unpublished order" are printed in the appendix accompanying the Petition for Writ of Certiorari. Neither of the opinions below is reported.

STATEMENT OF THE CASE

Petitioner Lewis Gene Freeman, a private citizen, initially appearing *pro se,* filed the suit seeking a judgment declaring the unconstitutionality of the recordkeeping and inspection provision of the Gun Control Act of 1968 (Public Law 90-618) and related provisions of the Act purporting to prohibit interstate shipments and sales of arms from a federally licensed dealer to a nonlicensee. Related issues challenged regulations promulgated by the Secretary of the Treasury pursuant to the Act.

Although the initial complaint filed by Mr. Freeman was undoubtedly defective in the choice of parties defendant

as well as other matters, he timely filed a motion for leave to amend together with a proposed amended complaint which raised the constitutional issues in a procedurally proper manner. The trial court denied the motion to amend and granted defendants' motion to dismiss and the Court of Appeals affirmed on the stated ground that the claims of the petitioner were "frivolous" by which we must infer that they mean that there is no recognized constitutional right of citizenship relating to the keeping and bearing of arms.

STATEMENT OF FACTS

Under the provisions of the Gun Control Act of 1968, petitioner or any citizen wishing to purchase firearms must complete Department of the Treasury Form 4473 (set forth in full at p. 90(a) to Petitioner's appendix on file herein). That form provides physical identification of the purchaser and of the weapon purchased and then becomes a part of the permanent firearms record maintained by the seller. In the event of discontinuance of the seller's business, the forms are required to be delivered to the Assistant Regional Commissioner for the Internal Revenue Service in the appropriate region. 26 C.F.R. § 178.127. Such records are available to the Assistant Regional Commissioner for examination and inspection. 26 C.F.R. § 178.121(b). It is, of course, self evident that these records become a part of a government-controlled information retrieval system. Unfortunately, recent events have demonstrated that there can be no presumption that information available to the federal government will not be misused. The potential of a "chilling effect" upon the exercise of a right guaranteed by the Bill of Rights cannot be lightly dismissed.

Because of the disposition of this case at an early stage of the proceedings, there is no evidence in the record upon which the lower court or this court could gauge a proper balancing between the rights guaranteed by the Second Amendment and whatever relevant governmental interests are affected. Nor is there evidence in the record upon which this court could determine whether the weapons involved are those which fall within the protection of the Second Amendment (a weapon whose "use could contribute to the common defense," *United States v. Miller*, 307 U.S. 174 (1938)). Thus, numerous factual questions which may be necessary to a final adjudication of this case remain unanswered.

ARGUMENT

I. There Exists a Pressing Public Interest Supporting Review of This Case

A. *There Has Been No Definitive Interpretation of the Second Amendment*

Although the Bill of Rights is a fundamental part of our constitutional heritage, there have been few cases dealing with the Second Amendment and none which can be considered a definitive, or even binding, interpretation today. Our research has uncovered only three occasions in which the Supreme Court has construed the extent of the constitutional right to keep and bear arms as guaranteed by the Second Amendment.

In *United States v. Cruikshank*, 92 U.S. 542 (1876), and in *Presser v. Illinois*, 116 U.S. 252 (1886), the Supreme Court was faced with challenges to state statutes which were alleged to contravene the right to keep and bear arms. In dismissing the challenge and upholding the state laws,

the Court concluded that the Bill of Rights constituted a limitation on the power of Congress and the national government, but did not constitute a limitation upon the states. Since *United States v. Cruikshank* applied the same [illegible] to the First Amendment, it is clear that those cases can have no continuing vitality in light of the numerous Twentieth Century cases holding that the Fourteenth Amendment incorporates the Bill of Rights. *See, e.g., Palko v. Conn.*, 302 U.S. 319 (1937). Certain dicta appearing in the *Presser* decision is significant, for the Court there stated that:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserve military force or reserve militia of the United States as well as of the states....

116 U.S. at 265.

The only other decision which we have found by the United States Supreme Court dealing with the Second Amendment is *United States v. Miller*, 307 U.S. 174 (1938). Oddly, this case lacked the adversary nature of most cases in that only the United States filed briefs or argued the case before the United States Supreme Court. Miller did not appear. This case dealt with an act of Congress making it illegal to transport certain weapons, including a short-barreled shotgun, in interstate commerce without first registering them. The trial court sustained a demurrer and dismissed the indictment under the Second Amendment. The Supreme Court reversed and remanded because of the lack of an evidentiary hearing to support a finding that such a shotgun is "part of the ordinary military equipment or that its use could contribute to the common defense" or otherwise has a reasonable relationship to the preservation or efficiency of a well-regulated militia. 307 U.S. at

178. Thus, the Court did not interpret the Second Amendment and, lacking any party asserting the unconstitutionality of the statute, simply remanded for further proceedings. The extent to which the right may go beyond the dicta of *United States v. Miller* remains undetermined. The implication, however, is clear that if a relationship between the weapon regulated and the militia exists then the federal government cannot impose undue restrictions on possession and use (Note 31 Alb. L. Rev. 74, 78 (1967)).

B. *Lower Court Decisions Conflict With the Apparent Holding of This Court in* United States v. Miller

To the extent that *United States v. Miller* can be held to be authority today, it stands for the assertion that there must be a fact-finding hearing before the claim of constitutionality can be weighed. There must be an opportunity to introduce evidence establishing a relationship between the type of weapon possession of which is regulated and "the common defense".

A series of recent lower court decisions have dealt with Second Amendment claims. (*See* Appendix I for an analysis of each case.) Some have followed *United States v. Miller* and rejected Second Amendment claims where there was no evidence in the record supporting the claim (*e.g., United States v. Decker,* 446 F.2d 165 (5th Cir. 1971); *Cody v. United States,* 460 F.2d 34 (8th Cir.), *cert. denied* 409 U.S. 1010 (1972)). Other cases, however, read *United States v. Miller* as dispositive of the constitutional issue (*United States v. Williams,* 446 F.2d 486 (5th Cir. 1971)), and dismiss Second Amendment claims as "meritless" (*United States v. Day,* 476 F.2d 562 (6th Cir. 1973)), or "frivolous" (this case below), or by flatly rejecting claims

that the right to keep and bear arms is a right guaranteed by the United States Constitution (*Eckert v. Philadelphia*, 477 F.2d 618 (3d Cir.), *cert. denied*, 414 U.S. 839 (1973)).

At best these and the other cases discussed in Appendix I demonstrate the lack of any consistent guiding principle controlling lower court applications of the Second Amendment. At worst, as in this case below, by denying opportunity for an evidentiary hearing, the cases constitute a direct conflict with the only guiding decision by this Court.

C. *Legislative Efforts to Regulate the Right to Keep and Bear Arms Require Judicial Guidance Regarding the Limits of Any Legislative Remedy*

A wide range of legislation is presently under consideration in the legislatures of this land. Many states have pending before them at the present time or during their latest legislative session some proposal to regulate the purchase, sale or possession of firearms. Lacking any guidelines in the extent to which the legislatures may act to regulate or restrain the possession of firearms, legislatures may enact legislation which improperly infringes upon the constitutional rights of the citizens. Equally undesirable, they may refrain from enacting laws which would be sustained by this court and which are in the public interest, in the mistaken belief that such laws are unconstitutional. For these reasons, there are broad and important public reasons for the court to act in an appropriate case to define the scope of the Second Amendment of the Constitution.

II. A Philosophy of the Second Amendment

The first ten amendments to the Constitution have been expressed as the "essential portion of the Constitution" without which the Constitution itself would never have

been accepted by the American people. C. Warren, *Congress, Constitution and the Supreme Court*, at p. 85. The first ten amendments were prepared and adopted

> . . . largely because of fear that the Government might unduly interfere with prized individual liberties. . . .

Adamson v. California, 332 U.S. 46, 70 (1947) (Black J. dissenting). In retrospect, the rights guaranteed by other portions of the Bill of Rights, such as the right of freedom of speech and freedom of religion, the right to be secure against unreasonable searches and seizures, the comprehensive due process rights of the Fifth Amendment and related rights are admittedly fundamental rights, perceived as such by all Americans.

In fact, this court has long ago noted the fundamental nature of these rights and their evolution from English history:

> The law is perfectly well settled that the first ten amendments to the Constitution commonly known as the Bill of Rights were not intended to lay down any novel principle of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors. . . .

Robertson v. Baldwin, 165 U.S. 275, 281 (1897). Notwithstanding the unquestioned importance of the other provisions of the Bill of Rights, to many, the right to keep and bear arms seems an anomoly. The purpose of this portion of the brief will be to outline a philosophy of the amendment grounded in the history surrounding its adoption, and to demonstrate the continuing vitality of that philosophy.

A. *The Relationship of Arms to Political Freedom*

The right to keep and bear arms is, like the right of freedom of speech and freedom of the press, in its ultimate

sense a political right. It is a right concerned with power, the allocation of power, and restraints upon the abuse of power. It is a right the guarantee of which grew out of the founders' fear of a standing army, a fear based both upon their own recent past and upon the experiences of England under the Stuarts. It has been called

> the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers;

J. Story, *II Commentaries on the Constitution* 646 §1897 (5th Ed. 1891).

A study of world history demonstrates the close interrelationship between weaponry and the political balance which has existed at all times in human societies. One prominent historian, William MacNeil, weaves an examination of this theme through his history of the world, *The Rise of the West* (University of Chicago Press, 1963). As he notes, transition from labor-intensive armament systems to capital-intensive armament systems has invaribly been accompanied by a transfer of political power from a broad to a narrow base. Thus, the development of the chariot in the Second Millenium before Christ transferred military supremacy to the aristocracy which had the ability to invest capital in the construction of chariots, and, more expensively, the development and upkeep of powerful horses. MacNeil, *op. cit.* 104-05 Later, the discovery of steel smelting made possible the development of steel weapons by use of which the infantrymen could overcome the aristocratic charioteers. *Id.* at 117-18. As a result, there was a transfer of power from the hands of the few to the hands of the many. "The abundance of iron had democratized warfare, so that extensive aristocratic empires no longer accorded with military realities."

Id. at 125. The result in that time frame was increased political localism and a broadened egalitarian base. This thesis is not novel, having first been advanced by Aristotle, *Aristotle, The Politics,* pp. 248-49 (Penguin Books, Ed. T. D. Sinclair, Tr. 1962). See Appendix II for a further synopsis of the MacNeil thesis. It is no accident that democracy first became an accepted political theory in the days of the supremacy of the Greek hoplite and phalanx, nor that the great nation states of Eruope were built when the centralized military control was feasible.

B. *The English Antecedents*

Some authorities trace the development of the right to keep and bear arms back to the fyrd existing in England in pre-conquest times and continuing in modified form as a supplement to feudal military tenure. *See* J. Whisker, *Our Vanishing Freedom,* Heritage House Publishers (1972). From the early principle that it was the obligation of citizenship to participate in the defense of the realm gradually developed, along with the nascent democratic doctrines of parliamentary government, a concomitant feeling that there was a "right" to participate in military activities.

The political rights of Englishmen reached their testing ground during the turbulent Stuart dynasty and, by the end of that period, the recognition of a right to bear arms had clearly crystalized. When the new rulers, William and Mary, were called upon to issue the Bill of Rights of 1689, reasserting pre-existing rights of the English people, they provided:

> That the subjects which are protestants, may have arms for their defence suitable to their conditions and as allowed by law.
>
> I W & M Sess. c.2, § 9.

As the Tennessee court concluded in *Aymette v. State*, the provision intended that the citizenry "being armed they may as a body rise up to defend their just rights, and compel their rulers to respect the laws." 2 Humphr. (21 Tenn.) 154, 157 (1840).

What had occurred was that the Stuart Kings found their efforts to control Parliament frustrated by the existence of armed citizens, participants of "trained Bands," similar to the organized militia, which had been established under Elizabeth I. In fact, the struggle of Charles I to disband the "Trained Bands" by proclamation in 1642 was a significant element in the confrontation between the Long Parliament and the English monarchy. *See* Note: "The Right to Keep and Bear Arms; A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights," 31 Alb. L. Rev. 74 (1967); Whisker, *op. cit.* at 2-4. After the Restoration, James II, by attempting to transform the standing army into a predominantly Catholic body again raised issues of the political nature of the right to keep arms, culminating in the Glorious Revolution of 1688 and the Bill of Rights. Feller & Getting, *op. cit. supra*, 48. The Tennessee Supreme Court summarized this episode as follows:

> The evil that was produced by disarming the people in the time of James II was that the king, by means of a standing army quartered among the people, was able to overawe them, and compel them to submit to the most arbitrary, cruel, and illegal measures. Whereas, if the people had retained their arms, they would have been able, by a just and proper resistance to those oppressive measures, either to have caused the king to respect their rights, or surrender (as he was eventually compelled to do) the government into other hands.

Aymette v. State, 2 Humphr. (21 Tenn.) 154, 157 (1840).

Another source has commented upon the ignominy in which Englishmen looked to a foreign king and a foreign navy to rescue their rights. G. M. Trevelyan, 2 *History of England* 269-70 (Doubleday Anchor ed. 1952).

C. *The American Experience*

What history teaches was recognized as well by the constitutional framers: if the government were accorded a monopoly of force, liberty could not long be secured. If military power were kept diffused, political power could not be centralized into tyranny. Speaking directly to that issue in the Federalist Papers, James Madison, writing as Publius, responded to fears that the federal government could establish a standing army which would trammel the rights of the people. He said:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the Federal Government: still it would not be going too far to say that the state governments with the people on their side would be able to repel the danger. . . . To [the standing army] would be opposed a militia amounting to near half a million of citizens with arms in their hands . . . it may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms will be most inclined to deny the possibility of it. . . . Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.

The Federalist Papers, No. 46, at p. 299 (Mentor Book Ed. 1961). His last observation bears repeating: an autocratic government dares not trust its citizens with arms. Thus to Madison the right to keep and bear arms was im-

plicit as part of the fundamental rights of citizenship and as an essential element of the checks on usurpations of power.

The colonial history of the country led the framers of the Constitution and of the Bill of Rights to be fully cognizant of the importance of an armed citizenry for the protection of the citizens against the government. Just as Englishmen had struggled for the right to keep and bear arms through the centuries, finally to see it secured through the confrontation with the Stuart Kings, the colonists too had had the question of control of arms pressed upon them in its direct relationship to their political rights. One of General Gage's early efforts was to deny gunpowder to the colonial militiamen. *See Suffolk Resolves* of Sept. 6, 1774, cited in Feller & Getting, *op. cit. supra,* fn. 11. The succeeding efforts of the English crown to seize control of the armaments and munitions stored by the Massachusetts Militia at Concord, was the proximate cause of the opening of military hostilities between the colonists and England, D. Higginbotham, *The War of American Independence,* p. 51, as was the confiscation of weapons of the inhabitants of Boston in 1775. *See* Note 31 Alb. L. Rev. 74 (1967). In the long military struggle which followed, it was undoubtedly only the fact that the Americans, unlike most popular revolutionary movements in modern times, began in possession of a large military capability that tilted the balance in favor of freedom. D. Higginbotham, *op. cit. supra* at 10.

It is natural that these men, anxious to secure the blessings of freedom to future generations, should insist upon the right to keep and bear arms as a means of shackling the central government. So long as citizens retained the

ability to resist, they believed, an oppressive government could not survive.

We might add that the very existence of the right to keep and bear arms undoubtedly serves as a strong deterrent against any inclination which a government may have toward oppression. Nor does the revolution in armaments in the last two centuries alter that deterrent. Our country's recent experience in Viet Nam has demonstrated the limits of power and demonstrated that large scale weapons are not effective to wipe out individual resistance. Closer to home, the unfortunate destruction of life and property in the core cities of our nation during the mid-1960's similarly illustrates that small handheld firearms are an effective means of protest, even rebellion, against a society which is seen to be oppressive. Such protests cannot be suppressed where there is widespread disaffection and can only be resolved by government policies which respond to legitimate grievances and thus isolate the disaffected members of society. The example is advanced to illustrate that the alternative of repression was *not* available to the government in the case of our urban crisis and that the government could not afford to adopt tactics which would alienate large groups. Were our government to become oppressive to any significant segment of the society, a disarmed populace would be helpless but an armed populace can, as Madison affirmed, rescue their rights from the hands of the oppressors. This, undoubtedly, is the "strong moral check" to which Mr. Story referred. (J. Story, *II Commentaries on the Constitution* 646 § 1897 (5th ed. 1891).)

D. *The Right to Keep and Bear Arms Is An Individual Right*

Dictum in early cases indicated that the adoption of the Second Amendment was not intended to confer or recognize a right of the individual but that it simply conferred an immunity from infringement by the federal government. Although that language would seem to have lost all force since decisions of this Court applying the Bill of Rights to the states, *see, e.g., Palko v. Conn.*, 302 U.S. 319 (1937), it is occasionally still quoted. *See Eckert v. Philadelphia*, 477 F.2d 610 (3d Cir. 1973).

That the right to keep and bear arms was perceived by the framers as an individual right should be clear from the prerevolutionary history of the right, and from its functional role in the political system. Moreover, it is strongly indicated from the fact that many of the original states provided for the right to keep and bear arms in their constitutions at the time that the Union was formed.[1] Clearly the framers were concerned about protecting the right from infringement at any level of government.

The language of the Amendment itself is clearly directed at preservation of the right of individuals. It is not now arguable that the phrase "the right of the people" imports some collective right in the people as a body rather than an individual right. Certainly that was not the contemporaneous interpretation of the framers of the First Amendment ("the right of the people peaceably to assemble") or the Fourth Amendment ("the right of the people to be secure . . ."). Mr. Justice Black has noted that the use of the

1. North Carolina Const. of 1776, § 17; Pennsylvania Const. of 1776, § 13; Virginia Const. of 1776, § 13; Vermont Const. of 1777, § 15; Massachusetts Const. of 1780, § 17.

words "the people" in other portions of the Bill of Rights strongly emphasizes the desire to protect individual liberty. H. Black, "The Bill of Rights," 35 N.Y.U. L. Rev. 865. 871 (1960).

Nor is the introductory phrase of the Second Amendment, "a well-regulated militia, being necessary to the security of a free State," properly read as language of limitation. To the framers of the Constitution, the militia does not refer solely to an organized body. This court has said:

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states. . . .

Presser v. Illinois, 116 U.S. 252, 265 (1886). The status of the unorganized militia is specifically recognized by the constitutions of many states. Plaintiff herein, for example, is a member of the militia of the State of Indiana pursuant to Article XII, Section 1 of the Constitution of that state. Since he is not enrolled in the militia, or what we would now call the National Guard, he is a member of the Sedentary Militia as defined by Article III of the Indiana Military Code (Indiana Militia, § 45-2001 and 2002). He, like all citizens, is available to defend the liberties of the country when needed and is entitled to prepare himself for that mission.

Had the Second Amendment been perceived of as solely a guarantee of the right of the states to preserve their own militia, the amendment surely would have been written in a different manner. The Constitution provides that Congress shall have power "to provide for organizing, arming and disciplining the militia," though the appointment

of officers and the authority of training the militia is reserved to the states. Article I, Section 8(16). The Congress reserves the right to provide for calling forth the militia to execute the laws of the Union. Article I, Section 8(15). And states are prohibited from maintaining troops in time of peace. Article I, Section 10(3). Had the intent of the Second Amendment been merely to insure that state governments retain control over their own militia to oppose the central government, the framers would surely have provided expressly for limitations upon the power of the central government over the state militia.

As the framers were well aware of the vulnerability of the organized militia to seizure by a central authority possessed with a standing army (the effort to seize the militia armaments and munitions at Concord stood forth as a clear warning) it is doubtful that they could have rested any faith in the efficacy of the Second Amendment to protect American liberties had they read it as limited solely to the organized militia of the states, which would be federalized as the first step of any oppressor. All of the language of Madison, of Story, of the framers of the Bill of Rights, indicates that the intent of the Second Amendment like the companion Amendments I through IX, was to secure individual liberties.

Hear Judge Cooley:

> The meaning of the provision undoubtedly is, that the people from whom the militia must be taken [that is, those who are capable of bearing arms to defend the country against foreign invaders or domestic tyrants] shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. . . .

> T. Cooley, "The General Principles of Constitutional Law," 281-282 (1891, 2d ed.).

To the framers of the Constitution and its first Amendments, the militia consisted of every able-bodied white male physically able to participate in the common defense, whether or not "enrolled" (this definition was accepted in *United States v. Miller,* 307 U.S. 174, 179 (1938)). All were available, and under an obligation, to respond to serve the defense needs of the society. For example, the Militia Act of May 8, 1972 required the enlistment of every able-bodied white male between the ages of 18 and 44. Viewed as a universal obligation of citizenship, the militia was designed to defend this nation. And the right to keep and bear arms, therefore, was viewed as co-extensive with citizenship and not as limited to particular organized state bodies. *Presser v. Illinois,* 116 U.S. 252 (1886). Only relatively recently did the present distinction between an Organized Militia (now the National Guard) and the unorganized militia of all citizens develop.

In the very debate surrounding the adoption of the Second Amendment the point was recognized:

> Whenever Governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late Revolution. They used every means in their power to prevent the establishment of an effective militia to the Eastward.
>
> Speech of Elbridge Gerry, 1 Annals of Cong. 749-50 (1789).

Yet the only protection against central government control over the militia is an individual right not easily susceptible to unnoticed or sudden abridgement.

E. *There is a Right of Self Defense Recognized by Law and Incorporated in the Second and Ninth Amendments to the U. S. Constitution*

Independent of the military application of the right to keep and bear arms, there is a recognized right to keep and bear arms for self defense. At the time of the adoption of the specific amendments of the Bill of Rights, there appears to have been some concern that the enumeration of certain rights might be construed to exclude other rights traditionally possessed in the Anglo-American system. To preclude that possibility, the Ninth Amendment was adopted, providing

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The right of the individual to use weapons in self defense is recognized in one form or another by the constitutions of 35 states (*see* Note, 31 Alb. L. Rev. 74, 80 (1967)), and generally by statutes elsewhere. For example, the Pennsylvania Bill of Rights adopted at that state's 1776 Constitutional Convention stated "that the people have a right to bear arms for the defense of *themselves* and the state. . . ." Pa. Const. Art. XIII (1776). That such a provision is so widespread is persuasive of its status as a recognized fundamental right of citizens. Implicit in the right to use a weapon is the right to possess it.

In these days of increasing crimes of violence, especially burglary and robbery, exercise of the right of self defense is the only recourse to many citizens.

F. *Evidence Will Sustain the Constitutional Right in the Instant Case*

Even if the opening clause of the Second Amendment is construed to limit the right to keep and bear arms to those arms the keeping of which and the proficiency in the use of which are pertinent to the military defense of the country from foreign invaders, rather than from domestic tyrants, evidence is substantial that our country's defense has been materially benefitted by the gunkeeping habits of our citizenry. For example, the Department of the Army has, since 1903, engaged in a program of loaning weapons to gunclubs and providing free ammunition. From 1959 to 1964 alone, ammunition costing $7 million was given to private gunclubs. In explaining this practice before the Senate Subcommittee to Investigate Juvenile Delinquency of the Committee of the Judiciary, the Secretary of the Army stated:

> The real justification for this program from the point of view of the Army, in my judgment, would lie right there. I think past studies have shown that, in Korea, something less than 50% of the riflemen in combat fired at anything. Men who have some talent as marksmen are more liable to shoot at something than men who do not. The range of the weapon is extended in the hands of a marksman. We have a great interest in this. We still depend on the rifleman and his being able to shoot his rifle well. *The fact that the recruit has been shooting squirrels as a boy enables him to be a better marksman when he comes into the army, and that is to our advantage.*

Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee of the Judiciary, U.S. Senate, p. 63, Testimony of Secretary of the Army, Steven Ailes (emphasis added).

To determine the effectiveness of its program, the De-

partment of the Army retained Arthur D. Little, Inc., a private industrial and management research firm, to evaluate and make recommendations regarding the Army's civilian marksmanship program. The Arthur D. Little study reached the conclusion that the civilian marksmanship program:

> . . . contributes significantly to the development of rifle marksmanship proficiency and confidence in the ability to use a rifle *effectively in combat* on the part of those who participate in the program or benefit indirectly from it.

A. D. Little, Report to Department of the Army, 1966, p. 15 (emphasis added). Without belaboring the point, it is clear that there is a demonstrable relationship between experience in the use of firearms and military proficiency and that evidence to that effect will be available at trial. Had such evidence been in the record in *United States v. Miller*, that case could not have been so decided.

G. *Permissible Limitations On the Right to Keep and Bear Arms*

Although the right to keep and bear arms is granted by the Constitution, it does not necessarily follow that no legislation affecting that right can be sustained. There is a strong argument that the prohibitions are absolute, *see* H. Black, "The Bill of Rights," 35 N.Y.U. L. Rev. 865, 873 (1960). However, the alternative argument of a "balancing test" may also be applied. Just as libel laws have been held valid for the punishment of abusive free speech, so too laws for the abuse of the freedom of possession of firearms are undoubtedly valid. Thus, the right to keep arms may be denied to certain individuals, such as convicted felons, *United States v. Tot*, 131 F.2d 261 (3d Cir.

1942), and is not necessarily infringed by laws prohibiting the bearing of concealed weapons without a license, *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (dictum). Obviously certain types of uses may be prohibited and possession of certain "non-militia" categories is not protected. *Aymette v. State*, 2 Humphr. (21 Tenn.) 154 (1840). *See, e.g.*, 42 U.S.C. § 2122 (possession of atomic weapons unlawful). One need not contend that there are no restrictions on the keeping and bearing of arms in order to contest the position that the right does not exist.

III. It Has Been Argued That There Is No Infringement of the Right to Keep and Bear Arms in the Present Statute Since it "Merely" Requires Registration of Dealers and Reporting of Transactions

It is the position of Amicus that while such laws do not constitute total abridgment of the right to keep and bear arms, they do constitute a substantial infringement. What public purpose can be served, for example, by a gun registration act? Unless the government has the right to confiscate, it is an invasion of privacy to require owners to register their guns. Provisions of the present act will result, over a course of years, in developing a gun registration program. The fact of the matter is that any pervasive national gun registration program places the power to confiscate weapons in the hands of the central government. That latent power would be destructive of the passive right guaranteed by the Second Amendment.

IV. This Case Is Appropriate for Decision. The Court Should Determine to Hear and Decide This Case

This case is appropriate for decision on this important question since it presents the issue squarely to the Court. Having been resolved in the lower court by a motion to dismiss before trial and a denial of a motion to amend, the issue tendered is clear: Does the Second Amendment give any rights to individuals? The evidentiary questions applying the facts of this specific case, the petitioner's specific situation, and other factual matters will be resolved at a future trial if the court determines that there is any basis upon which an individual may assert rights under the Second Amendment. Should this court take the major step of determining that there are no individual rights under the Second Amendment, then legislatures of our country will be able to rely upon the court's decision to determine their course of action in gun registration statutes.

CONCLUSION

What Amicus asserts is a basic right of freemen to take up arms to defeat an oppressive government. This right was expressly granted to the Barons in the Magna Carta (§ 61), and was broadened by the 18th Century to be a right held by all Englishmen. Blackstone listed the "Right to Bear Arms" in his chapter on "Absolute Rights of Individuals," calling it a device "to restrain the violence of oppression," 1 Blackstone, *Commentaries* 143 (14th ed. 1803), and had the following observation, after classifying the rights of person and property:

> And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administra-

> tions and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and lastly, *to the right of having and using arms for self-preservation and defense.* (Emphasis added; spelling modernized.)
>
> I Blackstone, *Commentaries* 144 (14th ed. 1803).

Thus, viewed as a political right, resort to the power vested in the people by the right of keeping and bearing arms is a right to be exercised only in extremis, as a last resort. So long as the government is responsible to the people, as it is today, it will always appear that a particular public interest overwhelms the latent general interest in the right to keep and bear arms. Therein lies great danger. For when the government ceases to be responsive to the populace, then the right to keep and bear arms is necessary as a restraint on a potentially or actually tyrannical government. But then the right will have atrophied beyond use unless it has been protected assiduously by our citizens and our courts.

Respectfully submitted,

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APPENDIX I

SUMMARY OF DISTRICT AND CIRCUIT COURT CASES CONSTRUING THE SECOND AMENDMENT

1. *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943).

Cases was convicted for transporting and receiving a firearm and ammunition in interstate commerce. The court followed the *United States v. Cruikshank* reasoning (discussed in Brief at 5-6), and concluded that the right to keep and bear arms is not a right "conferred upon the people" but that the Second Amendment simply prevents the federal government from infringing upon that right. The court added that it was impossible to formulate any general test to determine the limits of the Second Amendment and that a case by case decision was necessary.

2. *United States v. Adams*, 11 F. Supp. 216 (S.D. Fla. 1935).

A demurrer was filed to an indictment for violation of a national firearms act. The court held that the Second Amendment "does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act." To that extent, the decision is properly sustainable on the grounds that a reasonable classification has been formulated by the statute. The court continued to assert that the Second Amendment refers to the "militia and protective force of government; to the collective body and not individual rights." This was clearly dictum and unsupported by any prior decision of this court.

3. *United States v. Johnson*, 441 F.2d 1134 (5th Cir. 1971).

The court simply quoted the *Miller* decision regarding the lack of evidence in that case, and treated it as dispositive.

4. *United States v. Lauchli*, 444 F.2d 1037 (7th Cir. *cert. denied*, 409 U.S. 868 (1971)).

The court dismissed without discussion a claim raised under the Second Amendment.

5. *United States v. McCutcheon*, 446 F.2d 133 (7th Cir. 1971).

In a brief decision the court simply stated that it was sufficient to rely upon the decision of *United States v. Miller*.

6. *United States v. Decker*, 446 F.2d 164 (5th Cir. 191).

The court here also relied upon *United States v. Miller* and commented that there was no evidence indicating a conflict between the sections challenged and the maintenance of a well-regulated militia.

7. *United States v. Williams*, 446 F.2d 486 (5th Cir. 1971).

The court again misread *United States v. Miller* and stated that it disposed of the constitutional challenge.

8. *United States v. Gross*, 313 F. Supp. 1330 (S.D. Ind. 1970), aff'd. on other grounds, 451 F.2d 1355 (7th Cir. 1971).

The case here dealt with a challenge to federal requirements that dealers be licensed and the court commented that there was no evidence in the record that licensing of dealers destroys or impairs the efficiency of a well-regulated militia.

9. *Cody v. United States*, 460 F.2d 34 (8th Cir. *cert. denied*, 409 U.S. 1010 (1972)), properly construes *United States v. Miller* and finds no evidence in the *Cody* record upon which to find the act unconstitutional. From the context of the opinion it would appear that constitutionality was a subsidiary line of defense. There is no indication that Cody attempted to make an evidentiary hearing on the subject.

10. *United States v. Day*, 476 F.2d 562 (6th Cir. 1973), dismisses a claim based on the Second Amendment as "meritless" without discussion and citing *United States v. Miller*.

11. *Eckert v. Philadelphia*, 477 F.2d 610 (3rd Cir. *cert. denied*, 414 U.S. 839 (1973)).

A per curium decision, the court rejected a claim that a

city ordinance regulating the purchase and sale of firearms was unconstitutional. Relying, presumably, upon the decision in *United States v. Cruikshank*, the court stated that the appellant was "completely wrong" in his claim that the right to keep and bear arms is a right granted by the United States Constitution.

APPENDIX II

PERTINENT EXTRACTS FROM WILLIAM MacNEIL'S *THE RISE OF THE WEST* (University of Chicago Press, 1963)

1. Second Millenium B.C.

   Development of the chariot allowed the "barbarians" to conquer the Fertile Crescent, altering the political and social life of the societies, Pg. 104-106.

2. 1700-1500 B.C.

   Power in hands of charioteers made the exercise of power by the new leaders in the old manner of Hammurabi inconceivable. He would have seemed a tyrant in the eyes of his fellow warriors and been overthrown, Pg. 123.

3. 1200-1000 B.C.

   Discovery of cheap steel smelting techniques facilitated widespread use of steel weapons, making it possible for commoners to afford effective weapons, so that the infantryman equalled the charioteer—thus alienated subjects could equal the aristocratic military and the regime fell, Pg. 117-18.

4. 1200-1000 B.C.

   "The abundance of iron had democratized warfare, so that extensive aristocratic empires no longer accorded with military realities." This effect was accompanied by a return to "political localism." Pg. 124.

5. 600 B.C.

   The same forces operated in Indian civilization and the noble charioteers had lost supremacy by the Sixth Century. Pg. 171.

6. 1600-1000 B.C.

   The main prop of Mycenaean social structure was the autocratic character of the warfare of the age. Chariots in Greece confirmed or established "the power of an aristocracy, whose members alone could afford the elaborate equipment necessary for chariot warfare." Pg. 190.

7. 1000-600 B.C.

   Ancient Greece was dominated by noble families strong enough to limit the monarchy. "Horsemen had many advantages: they could move rapidly to surprise an enemy and charge with a momentum difficult for struggling infantry to oppose. But only men of considerable agricultural wealth could become cavalrymen, for natural grass was so scant in Greece that horses had to eat grain through most of the year. Thus, in proportion as cavalry became decisive in battle, noble landowners increased their influence in public affairs." Pg. 196.

8. Increased democratization and dispersion of political power resulted from the rise of the infantry, as the decisive factor on the battlefront. "An important change in military tactics checks, for a few centuries, the drift of Greek society toward the Middle Eastern patterns of polarization between a leisured aristocracy and an oppressed, poverty-stricken populace . . . The phalanx, therefore, was the school which made the Greek polis . . . [I]t greatly broadened the class of citizens who took an active part in polis affairs, for the hoplites who defended their cities in the battlefield could hardly be excluded from participating in civil affairs." Pgs. 198-200.

9. 200 B.C.-200 A.D.

   The Parthians were the first to adopt the "feudal" solution to the problem of defense from barbarian raids. Heavy horses and elaborate armor were needed, requiring villages to become part of a military system, which could support a new horse-mounted aristocracy. In turn, this resulted in a centralization of land power and disparity in wealth, but a decentralization of national power, since independent aristocrats might not answer the summons of their monarch. The result was a "medieval" pattern. Pgs. 393, 396.

10. 800-1200 A.D.

    The West also found that the cure for barbarian invasion was local self-defense conducted by "strong-armed and often insubordinant knights." Pg. 540.

11. 1300-1500 A.D.

A large segment of European society participated in the war and politics of medieval Europe: The pikemen of Switzerland and the bowman of England could challenge the aristocratic knights. "The result was to mobilize greater human resources within European society than was possible within the more rigidly hierarchical societies of other civilized lands." Pg. 558-59. See also, generally, Oman, The Art of War in the Middle Ages, Oxford University Press, treating the question of Swiss independence.

12. 1500-1650 A.D.

Concentration of power in the central government grew because of the developments in firepower. "As European armaments became more elaborate and expensive, monarchs could more easily monopolize organized violence within their states, thus strengthening domestic sovereignty." Pg. 582.